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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-544

PENNSYLVANIA ELECTRIC COMPANY,
METROPOLITAN EDISON COMPANY,
Petitioners

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

PENNSYLVANIA PUBLIC UTILITY COMMISSION; BOROUGH OF KUTZTOWN, GOLDSBORO & LEWISBERRY, PENNSYLVANIA; & ALLEGHENY ELECTRIC COOPERATIVE, INC.,
Intervenors

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF INTERVENORS ALLEGHENY ELECTRIC COOPERATIVE, INC. AND BOROUGHS IN OPPOSITION

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BRIEF OF INTERVENORS ALLEGHENY ELECTRIC COOPERATIVE, INC. And The Boroughs of EAST CONEMAUGH, GIRARD, HOOVERSVILLE, SMETHPORT AND SUMMERHILL IN OPPOSITION

OPINIONS BELOW

The initial opinion of the Court of Appeals is set forth in the Appendix to the pending Petition for Certiorari to review the decision below. Petition for Certiorari of Public Service Company of New Hampshire, *Public Service Company of New Hampshire* v. *Federal Energy Regulatory Commission*, 48 U.S.L.W. 3049 (U.S. Aug. 1, 1979) (No. 79-169). The Orders of the Federal Energy Regulatory Commission ("Commission") which were reviewed by the Court of Appeals are set forth as Appendices D, E, F, and G, respectively, to the Petition for Certiorari.

Neither the opinion of the Court of Appeals, its order denying rehearing, nor any of the Orders of the Commission have been reported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Did the Federal Energy Regulatory Commission err in rejecting Petitioners' proposed fuel adjustment clause surcharges as constituting retroactive ratemaking and as violations of the filed rate doctrine?

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are adequately set forth in the Petition.

STATEMENT

This brief is field on behalf of Allegheny Electric Cooperative, Inc. and Boroughs of East Conemaugh,

Girard, Hooversville, Smethport and Summerhill (being hereinafter collectively referred to as the Customers). Allegheny purchases electric power and energy at wholesale from Pennsylvania Electric Company ("Penelec") and Metropolitan Edison Company ("Met-Ed") (Penelec and Met-Ed being hereinafter collectively referred to as the "Petitioners"). The other Customers purchase electric power and energy at wholesale from Met-Ed. The Petitioners are sister companies, being operating subsidiaries of General Public Utilities Corporation. The Petitioners petitioned for review of Orders issued by the Commission [1] on December 19, 1977 denying the Petitioners' respective claims for fuel cost adjustment surcharges and also the Commission's Orders of February 13, 1978 denying the Petitioners' applications for rehearing of the Commission's December 19, 1977 Orders.

The Commission permits public utilities under its jurisdiction to include in rate tariffs filed with it a fuel cost adjustment clause providing that there be added to (or subtracted from) the base energy rate provided for in the tariff an amount reflecting the increase (or decrease) in the cost of fuel provided for in the base energy rate, which has occurred subsequent to the fixing of the base energy rate. Because the fuel cost figures for the billing month are not available at the time of billing,

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[1] On October 1, 1977, pursuant to the provisions of the Department of Energy Organization Act (DoE Act), Public Law 95-91, 91 Stat. 565 (August 4, 1977) and Executive Order No. 12009, 42 Fed. Reg. 46267 (September 15, 1977), the Federal Power Commission ceased to exist and its functions and regulatory responsibilities were transferred to the Secretary of the Department of Energy, and the Federal Energy Regulatory Commission which, as an independent commission within the Department of Energy, was activated on October 1, 1977. All references herein to the "Commission" shall be to the Federal Power Commission for the period prior to October 1, 1977 and to the Federal Energy Regulatory Commission for the period commencing October 1, 1977.

usually the fuel adjustment clause will use the costs for an earlier month or months and apply such costs to the kWh sold in the billing month.

On October 31, 1975, Met-Ed filed with the Commission a proposed rate increase for its wholesale customers of approximately $4,525,000 per year. The Commission accepted the filing and allowed it to become effective on January 1, 1976, subject to refund. In this rate increase, Met-Ed changed the base cost of its fuel adjustment clause from 6.03 mills per kilowatt hours (kWh) to 13.232 per kWh. The purpose of this change was to relate this cost to the 1975-1976 test year costs and to include nuclear fuel as well as fossil fuel generation costs in the base cost. Formerly, base cost was based on the 1972 fossil fuel cost data. No other change was made in the method of computing Met-Ed's fuel adjustment clause.

Both the old fuel clause and the new fuel clause provide that the fuel adjustment factor is to be applied to the kWh used by the Customers *in the billing month.*

Both clauses provide that the adjustment factors to be applied to such kWh "are to be determined as the three month totals for the period ending with the second calendar month preceding the billing month." (This is often referred to in the industry as the billing lag.)

Thus, Met-Ed continued to use the fuel cost actually incurred during the first three months of the prior four month period to impute the fuel cost included in the bills rendered for the billing period.

On November 26, 1975, Penelec filed with the Commission a proposed rate increase to its wholesale customers, of $9,412,064 per year. The Commission accepted the filing and allowed it to become effective on February 26, 1976, subject to refund. In this rate increase Penelec changed the base of its fuel adjustment clause from 4.745 mills per kWh to 12.086 per kWh. The purpose of

this change was to relate this cost to the cost of fuel in the test period, the 12 months ending June 30, 1976. Formerly, base cost was based on the fuel cost levels in 1971 and 1972. As with Met-Ed, no other change was made in the method of computing Penelec's fuel adjustment clause.

Both the old fuel clause and the new fuel clause provide that the fuel adjustment factor is to be applied to the kWh used by the Customers *in the billing month.*

Both clauses provide that the adjustment factors to be applied to such kWh "are to be determined as the three month totals for the period ending with the second calendar month preceding the billing month."

Thus, Penelec continued to use the fuel costs actually incurred during the first three months of the prior four month period to impute the fuel cost included in the bills rendered for the billing period.[2]

As shown above, in both the new and previous fuel adjustment clauses of the Petitioners the fuel adjustment factor is calculated as the difference between the base cost of fuel and the cost of fuel in the current period, defined, by the Petitioners, in both old and new clauses, as the average cost of fuel in the three-month period ending with the second month preceding the billing month. Thus, the rate increase filing by the Petitioners had no effect on the total amount to be recovered for fuel in any month under the combination of the base rate and the adjustment factor. Dollars were merely shifted from the adjustment factor to the base rate.

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[2] As can be seen, the Petitioners' actions were in all relevant respects identical, and they advanced identical testimony and arguments on behalf of their actions. In this brief, Customers will at times refer to Penelec, and at other times refer to Met-Ed. It should be understood that references to the actions and arguments of either Petitioner apply to both.

However, the Petitioners both claimed in subsequent filings that on the effective date of the proposed rate increases they would have incurred fuel costs above the costs in the pre-existing clause which would not be recovered because of the billing lag, and the updating of the base cost of fuel.

On January 28, 1976, Met-Ed filed for an additional rate increase consisting of a temporary surcharge to recover $519,726 in fuel costs which Met-Ed asserted would otherwise be unrecoverable; and on April 8, 1976, Penelec made a similar filing for a temporary surcharge to recover $1,418,729 which it likewise claimed would otherwise be unrecoverable. Both surcharges were designed to spread the collection of the alleged deficiency over a period of approximately 12 months.

By Order issued February 27, 1976, the Commission granted Allegheny Electric Cooperative, Inc.'s ("Allegheny") Petition to Intervene in the Met-Ed fuel surcharge case, Docket No. ER76-492, and on May 7, 1976 the Commission granted the Petition to Intervene of Allegheny and the Boroughs in Penelec's fuel surcharge case, Docket No. ER76-607.

In Opinions Nos. 790 and 790-A issued March 22, 1977 and May 20, 1977, the Commission in *Public Service Company of New Hampshire*, Docket No. ER76-285, affirmed an Initial Decision by an Administrative Law Judge which rejected the company's (PSNH) attempt to collect through a proposed surcharge fuel revenues which PSNH claimed were uncollected by its previously effective tariff. The Commission agreed with the Judge that any such attempt was unjust, and unreasonable, as constituting retroactive ratemaking. (Op. 790 at 3-4, 11-15).

The Commission, on December 19, 1977, based on its decision in *Public Service Company of New Hampshire*,

Opinion No. 790, rejected the fuel surcharges proposed by the Petitioners, and denied the Petitioners' applications for rehearing. The Commission did, however, point out one salient difference between claims made by Public Service Company of New Hampshire and the Petitioners:

> ". . . . while the facts here and in Opinion No. 790 are substantially similar in almost all important respects, there is one difference which makes Penelec's case even weaker. Under the facts of Opinion No. 790, the alleged undercollection by Public Service Company of New Hamshire (PSNH) was caused by terminating the lag provision and going to current month fuel costs, while with Penelec the lag provision remained unchanged and the alleged undercollection was caused by a change in the base fuel costs.[5] Thus, PSNH would be unable to make up in subsequent periods any underrecoveries of fuel costs incurred in the period prior to the change (elimination of the two month lag provision). In other words, PSNH would not be able to recover all of its fuel costs incurred during November and December, 1975, in the billings for January and February, 1976, as it would have collected under the old fuel clause. Penelec, on the other hand, retaining the same lag provision, will not have this problem. The Judge in this case explained this (ID slip at p.4) as follows:
>
> > " 'The ultimate effect of the lag is not affected by the revision of the fuel clause to increase the base period unit fuel cost to a value in the approximate neighborhood of current costs and sales accompanied by an equivalent increase in base energy rates. Theoretically the collections in a given month are put on a truly current basis to the extent of the increase in base energy rates; but since the fuel clause retains its arbitrary definition of "current period," actual collections in a billing period are automatically adjusted to unit costs computed over a period up to five months earlier, *so that the total rate per*

kwh in the billing month is the same as it would have been had the base energy rates and fuel clause base not been revised. The "fuel cost adjustment" will be smaller as of any given time, and may be negative (as it actually has been under Penelec's new FAC base) instead of positive, because it is made against a higher base. *The amount of money collected, from increased base energy rates plus fuel adjustment charges, will be the same.*' (Footnote omitted) (emphasis supplied)."

"[5] Penelec is arguing, in effect, that the base rates recover for current costs, while the fuel adjustment clause recovers for actual past fuel costs. This, of course, is erroneous as pointed out by Staff witness Tindal who stated that Penelec has failed to recognize ". . . that the basic energy rates to AEC and wholesale tariff customers recoup fuel costs not collected by means of the respective fuel clauses . . ." (Tr. 106).

Rehearing was denied on February 13, 1978. The Orders of December 19, 1977 and February 13, 1978 are the Orders which the Petitioners are appealing in this proceeding.

ARGUMENT

The Petition fails to establish grounds which would warrant review by this Court on *certiorari.*

The Petition relies on the Petition for Certiorari filed by Jersey Central Power & Light to review the decision of the United States Court of Appeals for the Third Circuit in *Jersey Central Power & Light* v. *Federal Energy Regulatory Commission*, 589 F.2d 142 (3rd. Cir. 1978). *Petition for Ceriorari Filed* 48 U.S.L.W. 3833 (U.S. May 15, 1979) (No. 78-1665).

This Court has denied *certiorari* in the *Jersey Central* case. 48 U.S.L.W. 3222 (U.S. Oct. 1, 1979).

Jersey Central is a sister company of the Petitioners. Its substantive claim, which was rejected by the Commission and the Third Circuit, and on which *certiorari* was denied, is identical with the claim made by Petitioners in this case. Any possible reason for granting *certiorari* in this case would have been likewise applicable in the Jersey Central case. In fact, the Jersey Central case was a stronger candidate for *certiorari* than the instant cases since Jersey Central's original filing with the Commission was rejected on summary disposition without a hearing, whereas the Petitioners here were accorded full evidentiary hearings at the Commission. Jersey Central's arguments in favor of a grant of *certiorari* were fully rebutted in Brief of Intervenor Allegheny Electric Cooperative, Inc. In Opposition, filed July 2, 1979, in the *Jersey Central* case, supra.

It is important to point out that the Petition erroneously stated the "Question Presented". The Petition refers to the tariff provision at issue here as "a just and reasonable electric utility tariff provision." The record is lacking any evidence tending to establish that the tariff provision in question is "just and reasonable".

The "Question Presented" also refers to the tariff provision as seeking "to recover for monies spent to purchase fuel consumed in generating electricity, where the monies were spent before the tariff's effective date, but the fuel costs to be recovered are properly allocated as cost to the billing months occurring after the tariff's effective date."

As found by both the Court of Appeals and the Commission, and as is readily discernible from a reading of the tariff, such fuel costs are *not* properly allocated as costs to billing months occurring after the tariff's effective date.

The opinion of the Court of Appeals is clearly correct. It carefully analyzed all of the arguments made by the Petitioners and rejected them. The Court of Appeals made it abundantly clear that its ruling was based on a straightforward application of the Federal Power Act's prohibition against retroactive ratemaking which has so often been affirmed by both the District of Columbia Circuit and this Court. The opinion below demonstrates that Petitioners' claims are in reality that the Commission made a factual mistake in its interpretation of their fuel adjustment clauses. The Court analyzed Petitioners' arguments and concluded both that the Commission was clearly correct and that the Commission's decision was supported by substantial evidence in the record.

Thus, the case presents no question of law, but merely the proper interpretation of a contract. Such a case does not merit *certiorari*. The only legal issue is beyond question. Petitioners do not attempt to attack the rule on retroactive ratemaking. The issue here has to do solely with the proper interpretation of the tariff.

One final argument by Petitioners must be dealt with. That is their claim that the Comission never rejected their contention that the surcharge provisions were designed to recover fuel costs which would have been recovered had the superseded fuel adjustment clauses remained in effect. This is simply not true, as shown in the quotation from the Commission's order rejecting Penelec's surcharge, quoted in Customers' Statement in this brief, *supra*, at pages 7-8. The Commission clearly did reject this position when it quoted with approval and affirmed the conclusion of the Initial Decision that Penelec's fuel revenues would be identical under both the old and new clauses.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Certiorari should be denied.

Respectfully submitted,

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